BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Siskiyou
(County File No. 091-06-47-01)

Administrative Docket No. 156

DECISION

Mark DeMott
Big Time Pest Control
724 Terrace Drive
Redding, California 96002
Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations (3 CCR) section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to $5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing on January 14, 2008, the Siskiyou CAC found that on September 1, 2006, the appellant, Mr. Mark DeMott, a licensed structural pest control operator, committed one violation of the State's pesticide laws and regulations pertaining to 3 CCR section 6614 and would be fined $700.

Mr. Mark DeMott appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

On September 1, 2006, Mr. Mark DeMott, a Branch 2 structural pest control licensee, operating as Big Time Pest Control, applied several insecticides to kill cockroaches at the Best Little Hair House/Deb's Delights in Weed, California. The hair salon was one of two downstairs businesses located in a two-story building that also contained four residential apartments. The four apartments were occupied. At the time of the application, the tenants of two of the upstairs apartments were at home. Each apartment exits to an exterior porch or staircase.

The insecticides applied were Demon WP, Wisdom TC, Gentrol IGR, Cy-Kick, and Orthene. The products were registered for use on cockroaches, although the registration for Demon WP had expired as of December 31, 2003. The CAC did not cite appellant for using an unregistered pesticide. The tenants did not receive advance notice of the pesticide application. The tenants from Apartment 3 became ill from the exposure to the pesticide, vacated the premises, and later that night sought medical care. They spent two nights away from their apartment. The owner of the art gallery adjacent to the salon closed his shop early and left due to noxious odors. The salon owner also closed her business and was unable to reopen for an appointment with a client the next morning. The salon did not reopen until the noxious odors dissipated.

Relevant Statute and Regulation

3 CCR section 6614, Protection of Persons, Animals, and Property reads as follows:

(a) An applicator prior to and while applying a pesticide shall evaluate the equipment to be used, meteorological conditions, the property to be treated and surrounding properties to determine the likelihood of harm or damage.

(b) Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when:

(1)....

(2)....

(3) There is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing normal use of such

> property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered.

A registered structural pest control company is required to give notice of a pesticide application as outlined in Business and Professions Code section 8538. For Branch 2 applications, the notice shall be provided prior to application, shall be given to the owner, or owner's agent, and tenant, in a least one of the following ways: first-class mail, posting in a conspicuous place on the property, personal delivery. Title 16 CCR section 1970.4 sets forth further notice requirements. As relevant here, under subsection (e), where the work to be performed is in a multiple family dwelling consisting of more than four units, the owner/owner's agent shall receive notice and other notices shall be posted in heavily frequented, highly visible areas including, but not limited to, all mailboxes, manager's apartment, in all laundry rooms, and community rooms. Complexes with fewer than five units will have each unit notified.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard; is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897; or is a violation that is a repeat Class B violation. The fine range for Class A violations is $700-$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a violation that is a repeat Class C violation. The fine range for Class B violations is $250-$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is $50-$500.

Appellant's Allegations

Appellant asserts that there was no evidence of contamination of nontarget public or private property since no laboratory tests were conducted. Appellant asserts that no health hazard existed because his application involved spraying contact insecticides to cracks and crevices and that no drift occurred. One of the pesticides sprayed is "stinky" according to appellant and the tenants smelled an odor only but were not contaminated. Appellant asserts that he notified the building owner and the owner's agent (the hair salon), posted an orange notification card on the front door of the salon along with a notification of completion of application, and that he had no duty to notify tenants of the application.

The Hearing Officer's Decision

The hearing officer found that appellant made an application of insecticides when there was a reasonable possibility of contamination to the rest of the building. The hearing officer found that the application created a health hazard and prevented normal use of the property. The hearing officer concluded that a violation of 3 CCR section 6614(b)(3) occurred.

The hearing officer based his findings on several factors. The notification sheet posted at the salon's door indicated that two of the pesticides were mixed at twice the maximum label rate. The hearing officer reasoned that a pesticide mixed at twice the maximum rate could have contaminated adjacent nontarget property. The hearing officer found that the application created a possible health hazard because the tenants did not receive adequate notice. 16 CCR section 1970.4 requires the applicator to give and post notice to the owner and in other heavily frequented and highly visible locations upon the property. In addition, the Wisdom label required that people present or residing in the structure during application must be advised to remove their pets and themselves from the structure if they see any signs of leakage. This notice was not given in violation of the label requirements.

The hearing officer also found that normal use of the property was disrupted by the application. The tenants of Apartment 3 spent two nights away from their apartment, the gallery owner closed early on Friday (the application date), and the salon cancelled a Saturday morning appointment and did not reopen until Monday.

The hearing officer found that a health hazard had actually occurred based on the statements of the tenants of Apartment 3 that they became ill from the smell and sought and received medical care for pesticide exposure. Because an actual health hazard was created, the hearing officer found that a Class A fine was appropriate.

The hearing officer discussed some of the evidence he relied upon in making his findings and how he determined the weight to be accorded that evidence. Although Mr. DeMott testified at hearing that he did not apply the two insecticides at twice the label rate and simply made a clerical error, the hearing officer found that the information found on two documents—the notification posting and the pesticide use report—outweighed the testimonial claim of clerical error. Mr. DeMott asserted that people were exposed to a harmless odor and no contamination was proven because of the lack of laboratory tests. The hearing officer rejected these assertions and found that the witness statements and medical assessments provided greater weight on the issue, especially in view of the seriousness of exposure to pesticides.

The Director's Analysis

The hearing officer determined that a violation occurred after addressing three issues—insufficient notice, use of twice the label rate of two pesticides, and the reports of noxious odors and illnesses reported by the tenants. The Director addresses each of these issues below.

Appellant testified that he traveled to Weed from Redding a week prior to the application to inspect the property and provide consultation to his prospective client—The Best Little Hair House. He testified that he walked around the premises and drove around the back. As

demonstrated by the testimony of the CAC's advocate Ms. Jodi Aceves and the photographs taken of the property, the older building had several areas under construction that left the structure open and susceptible to movement of air throughout the structure. The structure included two downstairs businesses and an apartment and three upstairs apartments. Each apartment was occupied and tenants were home in two of the apartments at the time of the application. Appellant testified that while at the premises the week prior to the application, he told the owner of the salon while she was on the phone with the building owner that they needed to inform the tenants of the pending pesticide application. Appellant testified that after the application and complaints he called the salon owner and asked why she didn't notify the tenants and she reportedly said because her pest control company at home never sprays anything that smells. Appellant asserts that because there were more than five units in the building he did not need to notify the tenants because it was up to the owner or owner's agent to notify them. Appellant considered the salon owner to be the owner's agent. None of the statements given by the salon owner, the building owner, or the part-time manager who resides in Apartment 5 mentioned being told they needed to give the tenants notice.

16 CCR section 1904.5(e) addresses multiple family dwellings and requires notice to be given to the owner/owner's agent and posted in certain named places. Appellant posted a notice only at the salon door. He did not post notice at mailboxes, in common areas, at any of the exterior staircases leading to the apartments, in laundry rooms or at the manager's apartment. Appellant referred to the salon owner as the owner's agent. She was a tenant of the building, not the manager, and simply contacted the building owner and obtained permission to have her unit sprayed. This building contained four residential units. Complexes with fewer than five residential units should have had each unit contacted. In addition, the label for Wisdom TC requires that people present or residing in the structure during application must be advised to remove their pets and themselves from the structure if they see any signs of leakage. Appellant argues that this section required the tenants to *see* leakage rather than smell leakage before the requirement for notice is triggered. The Director rejects that assertion. Clearly the label requires the notice be given prior to application so that tenants know they should evacuate if leakage occurs. It is unlikely that the word "see" is meant to include only visual recognition of leakage. Hanging an orange sign at the salon entrance only is insufficient notice[1].

Sufficient evidence exists in the record to establish that the appellant failed to adequately warn the tenants of the pending pesticide application. The record supports the hearing officer's finding that the inadequate notice did not give tenants the opportunity to prepare for or properly

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[1] Appellant testified that he thought the apartments had been vacated the day of application based on his interpretation of the law that the tenants should have been notified by the owner/owner's agent of the application. He did not do an inspection of the building the day of application or verify the absence of the tenants. His earlier inspection should have revealed to him the exterior staircases and access to the apartments other than through the salon. Appellant also should have notified the on-site manager. Appellant's myopic view of his obligations is of concern.

react to the effects of the application that resulted in a reasonable possibility of contamination.

The pesticide use report and the notice of completion of application left at the salon door report the use of two pesticides at twice the recommended label rates. These documents were prepared near in time to the actual application. The hearing officer gave these two documents more weight than appellant's testimony one year and five months after application that the rates reported were a clerical error. The hearing officer's determination of credibility is within his province and the Director will not disturb that finding. Sufficient evidence exists in the record to support the conclusion that the pesticides were applied at twice the label rate. Moreover, three additional pesticides were also applied as crack and crevice treatment. There was no testimony as to which pesticide was applied to which area of the salon or if the five pesticides were applied to every area of the salon. The building was old and under construction with torn out walls and ceilings. It is reasonable to infer that the application of five pesticides to the salon would create a situation where the pesticides themselves, or fumes from the pesticides, could move out of the salon to other locations. The interior stairway could carry the pesticides or fumes throughout the building.

The statements of all the tenants, both business and residential, establish that strong odors permeated the building. There was no testimony to establish that any perms were being done at the salon. Appellant infers that perm smells could have caused the odor. The salon owner indicated that she had moved furniture in preparation for spraying. That the salon was not doing perms or seeing clients at all on the day of application is a reasonable inference. Appellant suggests since the tenants often smell perm odors they should be used to strong odors, especially since they had been using bug bombs in an attempt to kill the roaches. The Director rejects this reasoning that the tenants are somehow barred from complaining about exposure to pesticide fumes just because they have smelled strong odors in the building before. Each of the pesticide labels contained language to avoid inhalation. The pesticides were formulated to kill insects including cockroaches. These pesticides contained "caution" warnings and one was labeled "warning". These are not non-toxic products as appellant would suggest. A cocktail of five pesticides was used, two over label rate. It is reasonable to infer that the tenants were exposed to pesticide vapors. It is reasonable to infer from the evidence that pesticide vapors and/or some of the toxic pesticides strayed beyond the cracks and crevices and escaped into the structure. It is not reasonable to assume that the tenants were exposed only to a harmless odor. Appellant argues that no laboratory tests exist so that there is no contamination. The fact that no laboratory test exists proves neither the existence or absence of pesticide exposure. However, sufficient evidence exists in the witness statements to support a finding of contamination.

The salon closed for the weekend and the gallery closed early because of noxious odors. Two tenants vacated their apartment for the weekend and sought medical care after falling ill

from the noxious odors. The record supports the hearing officer's finding that drift occurred, that the application resulted in contamination of nontarget private property, and prevented normal use of the property.

Appellant asserts that the no health hazard occurred because the tenants in Apartment 3 smelled only an odor and were not exposed to pesticides. There is no evidence in the record to support this assertion. The statements of the tenants and the medical records submitted at hearing support the hearing officer's finding of an actual health hazard. The violation was properly charged as a Class A violation. The levy of a fine in the low range of $700 is within the discretion of the CAC.

Conclusion

The commissioner's decision that Mr. Mark DeMott violated 3 CCR section 6614(b)(3) is supported by substantial evidence. The commissioner's decision to levy a fine of $700 is also supported by substantial evidence.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the $700 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

20 June 2008
Date

Mary-Ann Warmerdam, Director